# APPENDIX C
# SUMMARIES OF THE TESTIMONY OF THE WITNESSES
# UNITED STATES SENTENCING COMMISSION
# SENTENCING REFORM ACT 25TH ANNIVERSARY REGIONAL PUBLIC HEARINGS

**PUBLIC HEARING – TUESDAY AND WEDNESDAY, FEBRUARY 10–11, 2009**
**9:00 a.m.–4:45 p.m.**
**ATLANTA, GA**

## I. DISTRICT COURT BENCH

### Middle District of Florida
***The Honorable Gregory A. Presnell, United States District Judge***

Judge Presnell stated that "the Sentencing Commission . . . may become irrelevant, if it continues to promulgate and promote sentencing formulae which the judiciary disregard because of their perceived arbitrariness and lack of empirical foundation." (TR 133). He cited three guidelines, *viz.*, the crack, illegal re-entry and child pornography guidelines as examples of guidelines that may be afforded less deference than empirically-grounded guidelines.(TR 133).

Judge Presnell stated that the child pornography "guideline has been the subject of much recent criticism because it is not based on any empirical data or institutional analysis." (TR 134). In his experience with the guideline, "people on the lowest rung of culpability, that is, people who download and view child pornography in private, people who can truly be said to have an illness but who do not distribute or otherwise actively engage in this conduct, often under this guideline end up toward the statutory maximum." (TR 124).

## II. PRACTITIONERS

### Federal Public and Community Defenders

***Alan Dubois, Senior Appellate Attorney, Eastern District of North Carolina***
***Nicole Kaplan, Staff Attorney, Northern District of Georgia***

Mr. Dubois and Ms. Kaplan made the following specific recommendations as to how the Commission "can make sentencing [] work:"

1) Review "congressionally driven guidelines," including the child pornography guidelines. Citing the House Chair of the Subcommittee on Crime, Rep. Bobby Scott, Mr. Dubois and Ms. Kaplan suggested that the Commission should take a "long hard look" at whether "congressionally driven guidelines are appropriate." (TR 8). They attribute much of "the unwarranted severity, unwarranted disparity, and over-incarceration caused by the guidelines" to those guidelines that are congressionally driven. (TR 9).

2) Reduce unwarranted disparity by reducing unwarranted severity. Mr. Dubois and Ms. Kaplan maintain that the guidelines are too severe for relevant conduct, drugs, immigration, child pornography, fraud, firearms and career offender. They support their contention that some guidelines are unduly harsh by pointing to higher rates of government sponsored departure

motions and judicial variances associated with those guidelines. They state, however, that "the problem is that only some defendants, and not others, get relief from guideline sentences that are too harsh" because judges are reluctant to vary from the guidelines, resulting in unwarranted disparity. (TR 11).

Mr. Dubois and Ms. Kaplan stated that "as has been well-documented, §2G2.2 is dramatically flawed." It does "not exemplify the Commission's exercise of its characteristic institutional role. Many judges have found this guideline to be unsound and inhumane." (TR 28). They maintain that the "guideline invites draconian and manipulative charging practices by prosecutors." (TR 29).

Ms. Kaplan testified that, in her experience, the child pornography guidelines often produce ranges higher than the statutory maximums for those offenses. She stated "guideline ranges for child pornography are often higher than the penalties for many state crimes involving sexual assault of a child," and that "courts are providing detailed written reasons for why they continue to vary below the guidelines in pornography cases." (TR 69). She expressed a hope that the Commission would review this judicial feedback and adjust the guidelines accordingly.

**PUBLIC HEARING – WEDNESDAY AND THURSDAY, MAY 27–28, 2009**
**8:45 a.m. – 5:00 p.m.**
**STANFORD, CA**

## I. DISTRICT COURT BENCH

**District of Hawaii**
***The Honorable Susan Oki Mollway, United States District Judge***

Judge Mollway contended that guideline sentences in child pornography cases under §2G2.2 are too high. (TR 99).

**District of Idaho**
***The Honorable B. Lynn Winmill, United States Chief District Judge***

Judge Winmill found troubling "the continued ability of the prosecutor to affect the application of the guidelines in ways . . . not envisioned by either Congress or the Commission," including through charging decisions in child pornography cases. (TR 449–51).

## II. PRACTITIONERS

### Federal Public and Community Defenders

***Davina Chen, Assistant Federal Public Defender, Central District of California***
***Thomas Hillier, Federal Public Defender, Western District of Washington***

Mr. Hillier and Ms. Chen stated the Commission should substantially reduce the unwarranted severity of the child pornography guidelines. By doing so, it would reduce true unwarranted disparity, as well as the rate of sentences below the guideline range. Sentencing data, sentencing decisions, and the Commission's own empirical research demonstrate that these guidelines recommend punishments that are greater than necessary to satisfy legitimate sentencing purposes and create unwarranted disparity.

Mr. Hillier further discussed the sentencing practices in Washington. (TR 279–83). He stated that, realizing that uniformly severe punishment for child pornography is not a good "one size . . . fit(s) all" approach, the parties in his district get together to try to determine an appropriate sentence through plea bargaining. (TR 280–82).

**PUBLIC HEARING – THURSDAY AND FRIDAY, JULY 9–10, 2009**
**8:30 a.m.–5:15 p.m.**
**NEW YORK, NY**

## I. DISTRICT COURT BENCH

### Western District of Pennsylvania
***The Honorable Donetta W. Ambrose, Chief United States District Judge***

Judge Ambrose urged the Commission to review the increasingly harsh child pornography guidelines. (TR 336–39).

### Western District of New York
***The Honorable Richard J. Arcara, Chief United States District Judge***

Judge Arcara would like the guidelines to assist in determining, especially in child pornography cases where the guidelines use number of images to determine offense levels, which defendants pose a real danger to the community and a risk to children. (TR 113–14). Judge Arcara expressed concern that prosecutorial influence on sentencing, through the use of "fact bargaining" and substantial assistance departures, may result in disparity. Judge Arcara would like more alternatives to incarceration. Judge Arcara wondered whether Congress really intended for all child pornography sentences to be at or near the statutory maximum as dictated by so many guideline adjustments. (TR 141–42).

**District of Maine**
***The Honorable John A. Woodcock, Jr., Chief United States District Judge***

Judge Woodcock stated the Commission should 1) review variances in child pornography cases, and 2) advise the three branches of government "in the development of effective and efficient crime policy." (TR 124). Judge Woodcock believes the mandatory minimums are too high in child pornography cases and asked the Commission to work with Congress to review those penalties. (TR 139–41). Judge Woodcock discussed the factors he considers, both guideline and non-guideline, when imposing a sentence in a child pornography case. (TR 142-44).

## II. PRACTITIONERS

**Federal Public and Community Defenders**

***Alexander Bunin, Federal Public Defender, Northern District of New York***

Mr. Bunin argues that the child pornography guidelines are "dramatically flawed" and overly harsh. (TR 16).

**PUBLIC HEARING – TUESDAY AND WEDNESDAY, OCTOBER 20–21, 2009**
**8:30 a.m.–4:30 p.m.**
**DENVER, CO**

## I. DISTRICT COURT BENCH

**District of Minnesota**
***The Honorable Joan Ericksen, United States District Judge***

Judge Ericksen stated that guideline penalties for child pornography cases are more severe than state sentences for actually abusing a child. (TR 273).

**District of Colorado**
***The Honorable John L. Kane, Senior United States District Judge***

Judge Kane stated that some of the difficulties with child pornography cases are that "we do not see producers of these films. . . . the parents who sell their children or the step-fathers who captured them and attacked them in film and the actual perpetrators." (TR 74). He discussed two of his cases involving the possession of child pornography obtained on the Internet where the defendants were severely disabled, one on dialysis, the other a quadriplegic. He stated that the sentences for such individuals are the same as those for persons "actually profiting from these films, selling them and dealing with them." (TR 75).

## II. PRACTITIONERS

### Department of Justice

#### *David M. Gaouette, United States Attorney, District of Colorado*

Mr. Gaouette stated that some judges are "making it clear what they believe an appropriate sentence should be with little or no consideration of the advisory guideline range." (TR 3). He cited the child pornography guidelines as an example. (TR 3). Mr. Gaouette believes that the "current state of federal sentencing system increasingly favors judicial discretion over uniformity, consistency and certainty." (TR 3). He maintains that there is "little meaningful appellate review of sentences." (TR 3).

#### *B. Todd Jones, United States Attorney, District of Minnesota*

Mr. Jones discussed what he perceived to be cases of local disparity within his district, such as where significant below-guideline variances were granted in child pornography cases. (TR 7-8).

### Federal Public and Community Defenders

#### *Nick Drees, Federal Public Defender, Northern and Southern Districts of Iowa*

Mr. Drees believed that the child pornography guidelines are in need of revision. (TR 25–27). He stated that "the guidelines for child pornography offenses, driven by congressional directives and also mandatory minimums, are simply too severe . . . most judges who have testified before the Commission share this view." (TR 25). He stated that judges have decided to apply only parts of the guideline because some enhancements, like use of a computer, apply in virtually every case. (TR 25). Mr. Drees stated that in the first three quarters of 2009, 53.7 percent of defendants sentenced under §2G2.2 received below guideline sentences, 10.9 percent of which were identified as government sponsored. (TR 25). He believes that prosecutors create unwarranted uniformity in child pornography cases by prosecuting primarily offenders who are not dangerous. (TR 25). Mr. Drees maintains that the vast majority of defendants in these cases have no prior criminal history and very few have a history of sexual abuse or exploitation. (TR 25). He stated that "recidivism research shows that child pornography offenders, without prior contact offenses, have a very low risk of recidivism of any kind, rarely commit a subsequent contact offense, and do very well in treatment and under supervision." (TR 26). Mr. Drees recommends that the Commission provide explanations for the pornography guidelines, "stating what purpose or purposes each guideline is meant to accomplish, and by providing the evidence upon which the Commission relied to conclude that the guideline would be effective in achieving the intended purposes." (TR 27).

***Raymond P. Moore, Federal Public Defender, Districts of Colorado and Wyoming***

Mr. Moore discussed appellate cases affirming district court sentencing decisions that reached different results with regard to the soundness of the child pornography guidelines. (TR 12). He stated:

> The problem is not the standard of review. The problem is that courts do not know the underlying bases of these guidelines or what purposes of sentencing a given guideline is trying to accomplish. In other words, the solution is better guidelines, ones that are empirically based, fully explained in a rational and transparent fashion, responsive to judicial feedback and informed public comment, and reflecting advancement in knowledge of human behavior as it relates to the criminal justice process.

Id.

## III. COMMUNITY INTEREST GROUPS

***Ernie Allen, President and Chief Executive Officer, National Center for Missing and Exploited Children, Washington, D.C.***

Mr. Allen testified concerning the child pornography guidelines. (TR 207). He expressed a concern over the "increasing number of downward departures" in child pornography sentences which he believes results in "token sentences" that "trivialize and minimize . . . a very serious crime." (TR 207). Mr. Allen stated that child pornography is a serious crime that merits serious punishment. (TR 207). In addressing the criticism of the child pornography guideline, Mr. Allen opined that "the guidelines are not the problem . . . [t]he problem is the lack of understanding and awareness about the true nature and severity of this crime and the harm caused by these offenders to child victims." (TR 207).

Mr. Allen stated that the National Center for Missing and Exploited Children ("NCMEC") created the first child pornography tip line in 1985 and a cyber tip line in 1998, which has handled 744,000 tips from Internet providers and the general public regarding child pornography. (TR 208). Mr. Allen stated that since 2003, NCMEC has reviewed 28 million images and videos of child pornography and is currently receiving 250,000 images per week. (TR 208). Mr. Allen stated that in his view, the "fundamental problem is that child pornography is misnamed and misunderstood." (TR 208). He stated that it is not pornography, free speech or a victimless crime. (TR 208). Mr. Allen believes that "child pornography depicts crime scene photos, images of the sexual abuse of a child. They are contraband, direct evidence of the sexual victimization of a child." (TR 208). Mr. Allen stated that the circulation of these images "not only revictimizes the child" but also "drives the market for the production of new images." (TR 208-209).

Mr. Allen stated that from the millions of images that NCMEC has reviewed, "the vast majority of the victims are prepubescent and there's a growing number of infants and toddlers." (TR 109). He stated that many of these children are abused violently in images depicting bondage, sadism

and torture. (TR 209). He stated that most offenders do not innocently download an image or even a handful of images, but rather, build libraries of images which are "collected and viewed for the offender's personal sexual gratification and more commonly traded shared and/or sold online." (TR 209). Mr. Allen discussed the harm to the victims of child pornography and stated that "each viewing, each possession, each distribution of an image revictimizes that child anew." (TR 210). Mr. Allen stated that he was "deeply troubled" by the growing use of the term "mere possession" by the courts. (TR 210).

Mr. Allen stated that "like any other contraband, child pornography images are an illegal commodity that must be combated both at the point of production and at the point of distribution and possession." (TR 210). He discussed a Bureau of Prisons study finding that Internet offenders were "significantly more likely than not to have sexually abused a child via a hands-on act, and that these offenders tended to have multiple victims." (TR 212). Mr. Allen also stated that when a child has been abused, reporting of the abuse is far less likely when there is a video or photo that memorializes the abuse. (TR 213). He explained: "These children don't tell . . . because they're ashamed or embarrassed or they've been threatened or manipulated. They don't tell mom, they don't tell dad, they don't tell anybody." (TR 213). Mr. Allen indicated that "victims of online child pornography must deal with the permanency and circulation of the images of their sexual abuse. Once an image is on the Internet, it can never be removed and it becomes a permanent record of that abuse." (TR 213). He discussed the psychological problems experienced by child victims which continue well into adulthood. (TR 213).

Mr. Allen expressed a belief that the current base offense level for child pornography crimes is modest and that it is "only enhanced by what these offenders actually do, if they have large collections, if they are violent or sadistic images, if the children in those images are particularly young, if they're distributing them for profit or other purposes." (TR 214–15). He stated that in his view "weakening the guidelines and this continuing pattern of downward departures and token sentences is doing, and will continue to do, irreparable damage to the goal of stopping child pornography and will actually put countless real children at risk." (TR 215). He urged the Commission "to resist the clamor for change and to help us wake up the nation, including its judges, about the true nature and impact of this crime." (TR 215).

***Diane Humetewa, Principal, Public Advocacy, Squire, Saunders & Dempsey L.L.P., Phoenix, Arizona***

Ms. Humetewa believes that post-*Booker* judges and defense lawyers are "only just beginning to test the limits of discretion in sentencing." (TR 192). She indicated that currently federal prosecutors may be the only party to "depend on the strict calculation of the guidelines." (TR 193). She referenced child pornography cases where probationary sentences that represented dramatic departures from the guidelines were imposed and upheld on appeal. (TR 193). She stated that: "the question here is whether the appellate standard of review ultimately will eviscerate the uniformity in sentencing that was the original goal of the Sentencing Reform Act." (TR 193).

**PUBLIC HEARING – THURSDAY AND FRIDAY, NOVEMBER 19–20, 2009**
**8:30 a.m.–3:00 p.m.**
**AUSTIN, TX**

## I. APPELLATE BENCH

### Fifth Circuit Court of Appeals
***The Honorable Edith Jones, Chief Circuit Judge***

Chief Judge Jones believed the significant number of variances granted in child pornography cases indicates that there is something seriously wrong with that guideline. (TR 221–22).

Chief Judge Jones indicated that "in the child pornography [guideline] . . . it's not clear to me that we have enough background in those prosecutions, at this point in time, to really identify culpability in terms of, especially with these sophisticated cyber crimes in terms of the number of images and the events that the [] Commission has said we have to consider." (TR 221). She pointed to the "marked propensity of our district judges to deliver sentences not within the guidelines" and concluded that "whether that's good or ill... I think it's something like a 40 percent variance rate, and that suggests that there's something wrong with the guideline, something seriously wrong." (TR 221–22).

## II. DISTRICT COURT BENCH

### Southern District of Texas
***The Honorable Micaela Alvarez, United States District Judge***

Judge Alvarez expressed a disagreement with those who believe that the child pornography guidelines are too high. She believes that "it is important to remember that child pornography is not a victimless crime." (TR 271). She stated that "even simple possession of child pornography" could not have been engaged in "without some child having been somewhere abused by some adult." (TR 271). Judge Alvarez discussed the great harm suffered by children who are victimized by child pornography which continues as the images circulate. (TR 271–72). She described a letter from the mother of a child victimized by child pornography which detailed the effect that it had on the child victim (TR 272). Judge Alvarez believes that the guidelines appropriately reflect these concerns. (TR 272). She also urged the Commission to take into account the fact that if there was not a market for child pornography, the images would not be produced. (TR 273). She suggested that a greater understanding of the crime of child pornography itself is needed and that perhaps "the Commission could better lay out the rationale for the guidelines and what drove the guidelines in particular." (TR 273). She explained that the crime of child pornography itself is not understood. The "Commission could better lay out the rationale for the guidelines and what drove the guidelines in particular." (TR 273).

### Western District of Texas
***The Honorable Kathleen Cardone, United States District Judge***

Judge Cardone expressed agreement with the statements of Judge Alvarez regarding the immigration and child pornography guidelines. (TR 276). She indicated that she handles a "lot

of pornography cases" and discussed what she described as the "horrific, horrific images." (TR 276).

**Western District of Oklahoma**
***The Honorable Robin J. Cauthron, United States District Judge***

Judge Cauthron stated that "the guideline sentences for child pornography cases are often too harsh where the defendant's crime is solely possession, unaccompanied by any indication of acting out behavior on the part of the defendant." (TR 14). She suggested that the child pornography guideline should be flexible, "recognizing that a broad range of conduct is encompassed within them, some of which is truly evil deserving of great punishment." (TR 14). She also questioned whether the enhancement for use of a computer "makes sense" and stated "widespread as computer use is now, enhancing for use of a computer is a little like penalizing for speeding, but increasing that if you're using a car." (TR 15).

**Eastern District of Louisiana**
***The Honorable Jay C. Zainey, United States District Judge***

Judge Zainey suggested that the Commission recommend the elimination of mandatory minimums to Congress, including in child pornography cases (TR 27, 31–34). Judge Zainey also stated that there is a difference between a "user, slash, viewer" of child pornography and "the person who actually exploits children." (TR 32). He discussed the argument that punishing viewers will reduce the market for child pornography and the exploitation of children. (TR 32). While he stated that it is a "very good argument" he noted it applies equally to the drug market and mandatory minimums generally do not apply to drug users. (TR 32.). He stated "there's no statutory minimum for . . . the [drug] user, then why should there be a statutory minimum for the user of pornography." (TR 32).

## III. PRACTITIONERS

### Federal Public and Community Defenders

***Julia O'Connell, Federal Public Defender, Northern District of Oklahoma***

Ms. O'Connell stated that "the child pornography guidelines are unreasonably harsh" and urged "the Commission to revise them to provide punishment proportional to the offense and the risk to public safety." (TR 16). She indicated that in her experience, "the vast majority of child pornography defendants have no criminal history whatsoever [and] it is not surprising that judges across the country question the need for severe sentences for first-time offenders, and in particular, offenders who are not likely to re-offend." (TR 16).

***Jason Hawkins, Assistant Federal Public Defender, Northern District of Texas***

Mr. Hawkins stated that "the child pornography guideline is not in step with current reality." (TR 15). He maintains that "very few" defendants convicted of possession of child pornography have a history of abuse or exploitation of children. (TR 15). He indicated that "the research shows that child pornography offenders, without prior contact offenses, have a very low risk of

recidivism of any kind, rarely commit a subsequent contact offense, and do very well in treatment and under supervision." (TR 15). Mr. Hawkins believes that the current enhancements in the child pornography guidelines are "no longer meaningful" and the guideline "does not advise judges about those important public safety considerations." (TR 16). He stated that the "best indicator that this guideline needs revision" is the number of below-guideline sentences imposed in cases under §2G2.2 and the fact that many district judges have expressed disagreement with the guideline in published opinions. (TR 16). Mr. Hawkins urged the "Commission to study and report on whether possession of child pornography actually correlates with child exploitation, and to revise the guideline to distinguish among differently situated offenders on a rational basis grounded in research." (TR 17).

**PUBLIC HEARING – WEDNESDAY, JANUARY 20, 2010**
**8:30 a.m. – 3:00 p.m.**
**PHOENIX, AZ**

**PRACTITIONERS**

**Department of Justice**

***Dennis Burke, United States Attorney, District of Arizona***

Mr. Burke discussed the standard of review of sentencing decisions set forth by the Supreme Court in *Gall*. (TR 8). He believes that this "very deferential standard of review gives wide latitude to a district court judge to impose a sentence based on that individual judge's determination of what is reasonable in light of all the facts and circumstances in a given case," which "has made it difficult, if not impossible, in the Ninth Circuit to appeal extreme variances from the guidelines in the relatively few cases in which they occur without agreement by both parties." (TR 8–9). Mr. Burke stated several sentences in his district were "unreasonably low" but an appeal "was not feasible" because of the deferential standard of review. (TR 9). He pointed to a child pornography case where a sentence of probation was imposed despite an advisory guideline range of six to seven years of imprisonment. (TR 9). He stated "simply put, government appeals challenging downward variances, even extreme ones, are practically impossible because of the discretion afforded to district courts after *Booker*, particularly in the Ninth Circuit." (TR 9).

**Federal Public and Community Defenders**

***Heather Williams, Assistant Federal Public Defender, District of Arizona***

Ms. Williams stated that "the Guideline governing child pornography distribution and possession convictions, has become increasingly harsher in its level computation, many times based upon Congressional mandate. . . . [and that] judges consistently state that sentences for child pornography convictions are too severe and they vary from the Guidelines." (TR 48). She maintains that "child pornography offenders are less likely to recidivate than other offenders in other categories, are not likely to commit nor likely have not committed contact sex crimes, and respond well to supervision." (TR 51). Ms. Williams' testimony contains a detailed discussion

of the Butner study as well as studies that she believes support her position. (TR 48–51). Ms. Williams also voiced concerns regarding the enhancements in the child pornography guideline. (TR 51–54). She stated that the use of a computer in the offense "is the rule rather than the exception and the vast majority of defendants do not use the computer in a way initially contemplated by Congress." (TR 52). She also maintains that §2G2.2 "over-punishes less culpable defendants by failing to distinguish between active and passive possession." (TR 52).